

Robert H. Talton

CAPITOL OFFICE:
P.O. Box 2910
AUSTIN, TEXAS 78768-2910
(512) 463-0460



DISTRICT OFFICE:
P.O. Box 5661
PASADENA, TEXAS 77508
(281) 487-8818

January 9, 2004

District 144

House of Representatives

RQ-0161-GA

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OPINION COMMITTEE

The Honorable Greg Abbott
Texas Attorney General
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-43418-04
I.D. # 43418

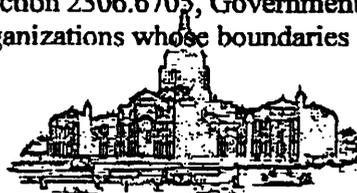
Dear General Abbott,

The purpose of this letter is to request an attorney general's opinion on whether the 2004 Texas Department of Housing and Community Affairs Qualified Allocation Plan (QAP), as adopted by its Board, is consistent with Senate Bill 264, 78th Texas Legislature, Regular Session.

The House Committee on Urban Affairs during the last regular session was intensely involved in the development of S. B. 264, the Sunset legislation for Texas Department of Housing and Community Affairs (TDHCA). We specifically made a number of changes which overhauled TDHCA's low income housing tax credit program and the allocation criteria for the private activity bonds associated with this program. The Department appears to have ignored the intent of the legislature by setting forth a QAP that does not conform with many of the changes we implemented in S. B. 264.

Therefore, I ask you to determine the answer to the following questions:

- (1) Whether Section 2306.6710 (b), Tex. Government Code, as amended by S. B. 264, is a mandatory provision that requires the 2004 QAP to rank applications for Low Income Housing Tax Credits by a point system that gives the greatest points, in descending order, to the nine factors listed?
- (2) Whether the Department has discretionary authority to intersperse other factors into the ranking system that will have greater points than a factor listed in Section 2306.6710(b)?
- (3) Whether the allocation criteria set forth in the 2004 QAP is in compliance with Section 15 of S. B. 264, regarding the issuance of private activity bonds?
- (4) Whether the notification process for neighborhood organizations in Section 50.9 (8)(B)(ii)(I) of the 2004 QAP is in compliance with S. B. 264, Section 20, codified at Section 2306.6705, Government Code, which requires that neighborhood organizations whose boundaries include the proposed



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development be notified, not those neighborhood organizations which are in the same ZIP code or neighboring ZIP codes?

- (5) Whether the signage requirement/written notification alternative, provided for in Section 50.9 of the 2004 QAP has basis in statute and conforms to the legislative intent of S. B. 264?
- (6) If the answer to any of the above questions is in the negative, what steps must be taken by TDHCA to ensure that the 2004 application cycle is conducted in accordance with law?

The House Committee on Urban Affairs believes it is essential that TDHCA complies with all of the guidelines of the new Sunset legislation and, most of all, uphold Texas and federal laws. Due to the importance of resolving the answers to these questions in a time frame which allows for the fair and legal consideration of 2004 applications, I ask that this request be expedited.

Sincerely,

Robert E. Talton
State Representative
Chair, House Committee on Urban Affairs

cc: The Honorable David Dewhurst - Lt. Governor
The Honorable Tom Craddick - Speaker of the House
Texas House Members of the Urban Affairs Committee
The Honorable Frank Madla - Chair Senate Committee on Intergovernmental Relations
The Honorable Ken Mercer
The Honorable Eddie Lucio
Elizabeth A. Anderson - Chair, TDHCA





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OPINION COMMITTEE

March 3, 2004

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FILE # ~~RD-00161-GA~~ OPINION COMMITTEE

I.D. # 43566

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Executive Director

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C. Kent Conine
Vidal Gonzalez
Patrick R. Gordon
Norberto Salinas

The Honorable Greg Abbott
Texas Attorney General
Attention: Ms. Nancy Fuller,
Chair, Opinion Committee
209 West 14th Street
Austin, Texas 78711

Re: Request for Opinion – Scoring Local Elected Officials’ Input in the
Housing Tax Credit Program

Dear General Abbott and Ms. Fuller:

In my capacity as Executive Director of the Texas Department of Housing and Community Affairs, I request your opinion on an issue concerning the scoring of written statements from local elected officials, in addition to those from state elected officials, in the Housing Tax Credit Program (“HTC”) administered by this Department. The Governing Board of the Department has directed the Department to request an opinion on this issue.

Question: The question on which we request your opinion is: In scoring applications in the HTC program, may the Department score written statements from local elected officials that represent constituents in areas that include the proposed location of a tax credit development, including input from the Mayor, City Council member, County Judge, County Commissioner, City Council, and the County Commission, or does recent legislation restrict scoring to input from state elected officials?

I. Timing of Your Opinion and the Tax Credit Application Cycle. The 2004 HTC application cycle is already underway. Two hundred and sixty-four pre-applications were received by the deadline of January 9, 2004. Approximately 200 final applications were received by the closing deadline of March 1, 2004. The Department evaluates and scores tax credit applications beginning this month. The time consuming work of underwriting applications that score high enough to be likely to receive credits takes place in April, May, and early June. Some adjustments to scores and remaining, last minute underwriting, take place in

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June. The Department's Governing Board is required by law to issue a list of approved applications not later than June 30 and to make final allocation decisions not later than July 31. (§2306.6724(e) and (f), Texas Government Code. All citations herein to sections of Chapter 2306 are to the Texas Government Code). A few final adjustments to scores, generally based on applicant administrative appeals, may be made between the June and July Board meetings.

Input from state and local elected officials is the last item to be received and scored. The deadline for the Department to receive written statements from elected officials is May 31, 2004. These statements will immediately thereafter be scored and an overall application score calculated. **In order to timely complete scoring of elected officials' input, your opinion is respectfully requested by May 31, 2004.** We apologize for the delay in requesting this opinion. A major factor in the delay was the need to respond to the issues concerning the HTC Program raised in Attorney General Opinion Request No. 0161-GA.

II. Background on the Housing Tax Credit Program ("HTC Program"). The HTC Program was created by the federal Tax Reform Act of 1986 and first used by the real estate development community in 1987. Section 42 of the Internal Revenue Code (26 U.S.C. §42) governs the program, together with state law in Chapter 2306, Texas Government Code. The HTC Program directs private capital to the development of affordable rental housing. For the 2004 application cycle, the Department estimates that approximately \$39 million in tax credits will be available for Texas. Developer applicants compete for the limited pool of credits based, primarily, on the score of their applications. The program is highly competitive. In last years cycle, 239 pre-applications and 121 final applications were received, and 68 of these were awarded tax credit allocations totaling approximately \$38 million. This year 264 pre-applications and approximately 200 final applications have been received.

III The Qualified Allocation Plan and Rules. The rules that govern the HTC Program are entitled the Qualified Application Plan and Rules ("QAP"). (See 10 Texas Administrative Code Chapter 50). The Department annually adopts a new QAP using notice and comment rulemaking, supplemented by additional public hearings and public involvement. Under state law, the Department's Board must adopt and submit the QAP to the Governor not later than November 15 each year. (§2306.6724(b)). The Governor is required to "approve, reject, or modify and approve" the plan not later than December 1. (§2306.6724(c)). On December 1, 2003, the Governor approved the 2004 QAP and Rules, as submitted by the Department.

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IV. Relevant QAP provision. The QAP section that is pertinent to the question raised is §50.9(g)(6), and specifically subparagraph (C). §50.9(g)(6) states:

(6) Support and Consistency with Local Planning. All documents must not be older than 6 months from the first day of the Application Acceptance Period. Points may be received under any of subparagraphs (A) through (C) of this paragraph.

(C) Community Support from Elected Officials. Points will be awarded based on the written statements of support or opposition from local and state elected officials representing constituents in areas that include the location of the Development. Letters of support must identify the specific Development and must clearly state support or opposition of the specific Development at the proposed location. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or official no later than May 31, 2004. Letters received after May 31, 2004 will be summarized for the Board in the board summary provided by staff, but will not affect the score of the Application. Officials to be considered are those officials in office at the time the Application is submitted. Letters of support from state officials that do not represent constituents in areas that include the location of the Development will not qualify for points under this Exhibit. Points can be awarded for letters of support or opposition as identified in clauses (i) through (ii) of this subparagraph, not to exceed a total of 9 points. Neutral letters, or letters that do not specifically refer to the Development, will receive neither positive nor negative points. **The Governing Board has directed the Department to request an opinion from the Attorney General on whether recent legislation permits scoring for input from officials other than state officials. If the Attorney General renders an opinion that only input from state officials may be scored, then city and county input will not be scored.**

(i) from State of Texas Representative or Senator (support letters are 3 points each, maximum of 6 points; opposition letters are -3 points each, maximum of -6 points); and

(ii) from the Mayor, City Council member for the area, County Judge, County Commissioner for the area, or a resolution from the City Council or County Commission (support letters or resolutions are 3 points each, maximum of 3 points; opposition letters or resolutions are -3 points each, maximum of -3 points).

(Emphasis added).

Note that the QAP specifically alerts tax credit applicants that the Department is requesting an Attorney General's opinion on this issue. The relatively small

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adjustments in scores that may be necessary based on the Attorney General's opinion can be calculated in early June.

V. Relevant Statute. The 78th Regular Legislative Session in S.B. 264, section 22, passed substantial amendments to one statutory provision that addresses the scoring of tax credit applications. Section 22 of S.B. 264 amended §2306.6710(b), in pertinent part, as follows:

SECTION 22. Section 2306.6710, Government Code, is amended by amending Subsections (b), (d), and (e) and adding Subsections (f) and (g) to read as follows:

(b) If an application satisfies the threshold criteria, the department shall score and rank the application using a point system that:

(1) prioritizes in descending order criteria [based on criteria that are adapted to regional market conditions and adopted by the department, including criteria:

[(1)] regarding:

(A) financial feasibility of [the income levels of tenants of] the development based on the supporting financial data required in the application that will include a project underwriting pro forma from the permanent or construction lender;

(B) quantifiable community participation with respect to the development, evaluated on the basis of written statements from any neighborhood organizations on record with the state or county in which the development is to be located and whose boundaries contain the proposed development site [the rent levels of the units];

(C) the income levels of tenants of the development [period of guaranteed affordability for low income tenants];

(D) the size and quality of the units [cost by square foot of the development];

(E) the commitment of development funding by local political subdivisions [size, quality, and amenities of the units];

(F) the level of community support for the application, evaluated on the basis of written statements from state elected officials [the services to be provided to tenants of the development];

(G) the rent levels of the units [commitment of development funding by local political subdivisions that enables additional units for individuals and families of very low income];
[and]

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(H) the cost of the development by square foot
~~[level of community support for the application, evaluated on the
basis of written statements of support from local and state elected
officials representing constituents in areas that include the
location of the development]; and~~
(I) the services to be provided to tenants of the
development.

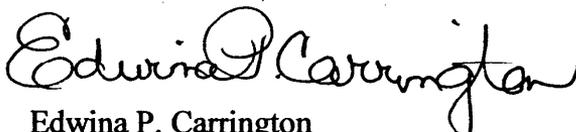
(Emphasis added).

Note that the amended language of the section includes in §2306.6710(b)(1)(F) the scoring of written statements from state elected officials and deletes in the amendment to §2306.6710(b)(1)(H) scoring of input from local officials. Prior to this amendment and following then existing law, the Department scored input from both state and local elected officials.

VI. Development of the 2004 QAP. Based on the deletion from §2306.6710(b)(1) of scoring for local officials, the Department proposed to delete local official scoring from the QAP. During the rulemaking process, however, the Department received considerable input to score both local and state officials' input. At the November 14, 2003 meeting of the Department's Board, the Board considered the 2004 QAP for final approval. At that meeting, the Board heard public comment from an association of affordable housing providers requesting that the Department continue its prior procedure of scoring both state and local officials' input. The Board also heard from the Legislative Director to the sponsor of S.B. 264, State Representative Callegari, who stated that it was the representative's intention that both state and local officials' input be scored. Based on this public input, the Board voted to add scoring for local officials' input back into the 2004 QAP, but directed the Department to seek an Attorney General's opinion on the issue.

Because of the statutorily required deadlines for the tax credit program, we **respectfully request that you publish your opinion on this issue by May 31, 2004**, so the scoring of tax credit applications may be properly finalized in early June 2004. Thank you for your assistance.

Sincerely,



Edwina P. Carrington
Executive Director

EPC/cw